adjust their status under section 1255(i) are not inadmissible under section 1182(a)(9)(C)(i)(I). On March 5, 2004, a one-member panel of the BIA affirmed the IJ, ruling that section 1255(i) only applies to aliens who entered the country illegally on one occasion. This interpretation disregarded the plain reading of the statutes and invented a new tenet in immigration law – that section 1255(i) only applies to aliens who entered the United States illegally on one occasion. The one-member panel concluded that insofar as Mortera entered the country illegally on more than one occasion he is inadmissible under section 1182(a)(9)(C)(i)(I) and, therefore, not eligible to adjust his status under section 1255(i). The BIA accordingly dismissed Mortera's appeal.

(iii) Before the Court of Appeals

Mortera timely petitioned the United States Court of Appeals for the Fifth Circuit for further review on March 24, 2004. Jurisdiction was proper before the Fifth Circuit Court of Appeals pursuant to 8 U.S.C. § 1252 because Mortera was appealing a final order of removal, which arose from an IJ's decision in San Antonio, Texas. The circuit court determined that it was ambiguous whether § 1255(i) applied to aliens with multiple illegal entries or not. After finding that the agency's construction of the statute was rational, the court affirmed the decision. Mortera subsequently filed a motion for rehearing en banc which was denied.

REASONS FOR ACCEPTING WRIT OF CERTIORARI

Supreme Court review is necessary in this case to (1) maintain uniformity of law (2) to address a matter of exceptional importance that affects a myriad of immigrant families in the United States and (3) to correct egregious error committed by the lower court, which created an unfair precedent.

A. The court should take certiorari in order to maintain uniformity of law and to resolve a conflict between the circuit courts.

The lower court's decision in this case is at direct odds with the Ninth Circuit's ruling in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th. Cir. 2004).[3] *Perez-Gonzalez* states that the language of section 1255(i) unambiguously allows aliens physically present in the United States to adjust their status. *Id.* at 793. Therefore, the Ninth Circuit allows aliens to adjust their status under section 1255(i) even if the applicant entered the country illegally after a deportation. *Mortera-Cruz*, by stark contrast, determined that it was ambiguous whether section 1255(i)'s terms

[3] Unlike the case before the lower court, *Perez-Gonzalez* interpreted the interplay between paragraph II of section 1182(a)(9)(C)(i), whereas the lower court was confronting paragraph I. Paragraph I of section 1182(a)(9)(C)(i) provides that aliens who have accrued over one year of unlawful presence, then leave, and reenter illegally are inadmissible. Paragraph II of the same provision provides that aliens who were previously removed and then reenter illegally are similarly inadmissible. Aliens in paragraph II are inadmissible regardless of the amount of unlawful presence they accrued. Section 1255(i) trumps both provisions of section 1182(a)(9)(C) because it forgives the alien's illegal entry.

allow aliens – physically present in the United States – to adjust their status if the alien has entered the country illegally on more than occasion.[4] As such, aliens residing in the Fifth Circuit's jurisdiction can only adjust their status under section 1255(i) if they have just one illegal entry, while aliens in the Ninth Circuit can adjust their status under section 1255(i), irrespective of their number of illegal entries. This difference of opinion is crucial to Mortera. If the language is plain, not ambiguous, then immigrants, like Mortera, can adjust their status even if they have entered the country illegally on multiple occasions.

This court should accept certiorari to resolve the conflict between the lower courts. The present split between the circuit courts promotes forum shopping among aliens seeking to adjust their status pursuant to section 1255(i). Aliens with multiple illegal entries are in a much better legal position if they apply for adjustment in the Ninth Circuit's jurisdiction rather than the Fifth's.[5] Such forum shopping will decrease the public's respect for the

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[4] The Fifth Circuit relied upon the Tenth Circuit's decision in *Berrum-Garcia v. Ashcroft*, 390 F.3d 1158 (10th Cir. 2004) in its decision. *Berrum-Garcia*'s ruling is in direct opposition to *Perez-Gonzalez* insofar as it claims that section 1255(i) only applies to aliens who entered the country illegally on one occasion. The Tenth Circuit's decision, as such, increases the need for Supreme Court review. *See also Lattab v. Ashcroft*, 384 F.3d 8, 17 (1st Cir. 2004) in which the First Circuit cast doubt upon the legal correctness of *Perez-Gonzalez*. *Lattab*, however, did not make a determination of whether section 1255(i)'s language is plain or ambiguous.

[5] Based upon the Ninth Circuit's decision, the BIA has determined that section 1255(i) trumps the application of section 1182(a)(9)(C)(i)(I) in cases stemming from that Circuit. *See, e.g., Matter of Velasquez*, 2004 WL 2952152 (BIA 2004).

law as aliens applying for section 1255(i) benefits in California will receive their lawful residence status, while those applying in Texas will be deported. It is this court's duty, therefore, to accept certiorari and resolve this conflict.

B. This case merits Supreme Court review because it presents a matter of exceptional importance which affects a myriad of families in this country.

The purpose behind every version of § 1255(i) was to promote family unity. When the LIFE Act passed, Congress stated "spouses, children, parents and siblings of permanent residents of U.S. citizens will now be able to adjust their status in the U.S. and avoid needless separation from their loved ones." 146 Cong. Rec. S11850. The lower court's decision to apply § 1182(a)(9)(C)(i)(I) to section 1255(i) frustrates this expressed Congressional intent. The decision not only disallows many § 1255(i) aliens to adjust within the United States, it requires them to be separated from their families for a period of 10 years. Spouses will be separated and parents will be torn away from their children – needlessly. Far from achieving the noble goal of family unity, the lower court's decision will literally tear families apart.

In Mortera's case alone, a United States citizen will lose a spouse and three United States citizen children will lose their father. In other cases, employers will lose dependable employees. So much loss on account of a one-member panel of the BIA's absurd determination that section 1255(i) only applies to aliens who entered the country illegally on one occasion. This court should accept certiorari in order to safeguard American families from

needless separation; the court should accept certiorari to ensure that United States citizen, Margarita Mortera, can reside with her spouse and that her three United States citizen children can have their father present in their home.

C. This case merits Supreme Court review because it creates a grossly unfair precedent and contains demonstrable error.

1. The lower court's decision creates a grossly unfair precedent which casts an appearance of impropriety upon the government.

The lower court's decision allows the government to accept a $1,000 penalty payment from an illegal alien – a payment given to the government in order to forgive the alien's illegal entry – then deport the alien, based upon the same illegal entry, without refunding their money. With the passage of the LIFE Act in 2000 and the extension of section 1255(i), Congress specifically advised the INS to alert illegal immigrants about their eligibility to adjust their status, even if they entered the country without inspection.[6] The INS followed Congress's advice and, as a result, multitudes of illegal immigrants applied for section 1255(i) benefits. Relying upon the INS's representation

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[6] The Joint Memorandum Concerning the Legal Immigration Family Equity Act of 2000 and the LIFE Act Amendments of 2000 provides:

> In order to ensure that persons who may benefit from this provision are aware of this legislation, we strongly encourage the INS to conduct a broad outreach program within the immigrant communities.

146 Cong. Rec. S 11851 (emphasis added).

that their illegal entry would be forgiven, many of these aliens paid the government a $1,000 filing fee. Five years later, the government now claims that some of these aliens are not eligible to adjust under section 1255(i), in part, because they entered the country without inspection. The applications are denied based upon an illegal entry, which the government promised it would forgive. The government then keeps the aliens' money, deports them, and forcibly separates them from their families for a period of ten years. Not only is this ruling demonstrably in error, it is grossly unfair. This court should accept certiorari to correct this manifest injustice.

2. The lower court's decision is demonstrably erroneous because section 1255(i) is not ambiguous and, even if it is ambiguous, the BIA's decision is undeserving of *Chevron* deference.

i. The lower court erred by determining that section 1255(i) is ambiguous.

Section 1255(i) provides, in part, that certain aliens "who entered the United States without inspection" can adjust their status. The panel in *Mortera-Cruz* believed the statutory language was ambiguous, saying that section 1255(i)'s reach is uncertain; in other words, the panel believed it was unclear whether section 1255(i) applies to aliens with multiple illegal entries or aliens that have entered the country illegally just once. The panel erred in its conclusion; the statutory language plainly includes aliens who entered the country illegally on more than one occasion.

The phrase "who entered" the United States is referring to the alien's last entry into the country; it is not a numerical limitation upon the application of section 1255(i). Section 1255(i)'s application is not contingent upon the amount of illegal entries made by an alien, but solely whether the alien's last entry was without inspection. As such, an alien can have multiple illegal entries into the United States and still be qualified to adjust his or her status under section 1255(i). This is why the 9th Circuit determined that section 1255(i) clearly applies to aliens already inside the United States.

The concept that section 1255(i) only applies to aliens who illegally entered the United States on one occasion was invented by a one-member panel of the BIA in a non-published decision and has absolutely no legal precedent.[7] Instead of concocting a new method of interpreting section 1255(i), the BIA should have simply applied the statutory terms and mechanisms provided to it. The structure of the Immigration and Nationality Act provides that when the paragraphs of section 1182(a) conflict with other sections of the Code, they are inapplicable.[8] The savings clause, in this case, provides that section 1255(i) eligible aliens are not inadmissible under section 1182(a)(9)(C)(i)(I). This

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[7] In the lower court's decision to afford the BIA *Chevron* deference, the court noted that the BIA speaks for the entire executive branch in matters of immigration. It is doubtful, however, that the executive branch desired a one-member panel of the BIA to speak for the administration when the one-member panel developed a tenet of immigration law, on his own, which was previously unheard of in immigration law.

[8] Section 1182(a)'s savings clause that its paragraphs apply, "Except as otherwise provided in this Act. . . ." The savings clause should operate in this case because section 1182(a)(9)(C)(i)(I) is providing otherwise than is provided in section 1255(i).

statutory solution is plain and unambiguous; *Mortera-Cruz* erred by following the judicial activism outlined by a one-member panel of the BIA.

ii. Even if section 1255(i)'s reach is ambiguous, the BIA's decision does not deserve *Chevron* deference because it leads to an absurd result and is irrational.

The BIA's construction of section 1255(i) does not merit *Chevron* deference because it is absurd.[9] As noted above, the BIA's decision allows the government to entice aliens to pay $1,000 by representing to them that it will forgive their illegal entry and then denies their applications, deports them, and keeps their money based, in part, upon their illegal entry. The BIA's decision is furthermore undeserving of *Chevron* deference because it is irrational. The lower court's decision needlessly separates families, contrary to Congressional intent. Such unreasonableness is likewise undeserving of *Chevron* deference.

Mortera-Cruz determined that the BIA's decision was rational for two reasons: (1) aliens inadmissible under section 1182(a)(9)(C)(i)(I) are more culpable than aliens inadmissible under section 1182(a)(6)(A)(i) (which provides that aliens with an illegal entry are inadmissible); and (2) not all section 1255(i) aliens are inadmissible under section 1182(a)(9)(C)(i)(I). It is worthy to note that neither of these principles were advanced by the BIA and do not salvage the BIA's irrational disagreement with Congressional intent.

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[9] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Foremost, this case is not about culpability, but statutory eligibility. Section 1255(i) provides that aliens with multiple illegal entries can apply to adjust their status; it does not say adjustment is mandatory. An IJ must weigh a section 1255(i)'s applicant's positive equities against their negative equities and make a discretionary decision about the alien's desirability as a permanent resident. An alien with multiple illegal entries may not survive such a discretionary weighing process. This is the scheme created by Congress; it is not rational for the BIA to not follow it.

The fact that not all section 1255(i) eligible aliens are inadmissible under section 1182(a)(9)(C)(i)(I) does not provide a rational reason to apply the inadmissibility ground to section 1255(i). Considering that section 1255(i) specifically allows aliens inadmissible under section 1182(a)(9)(C)(i)(I) to adjust their status, the ground of inadmissibility is not applicable. The court erred by attempting to apply this as a rational reason to deny Mortera benefits under section 1255(i). In short, no rational reason supports the BIA's construction of these statutes; on the contrary, the BIA's decision leads to an absurd result and is irrational.

CONCLUSION

This case merits Supreme Court review to maintain uniformity of law, to address a matter of exceptional importance which affects a myriad of families in the United States and to correct a grossly unfair precedent which was wrongly decided. Therefore, Mortera respectfully requests the court to grant certiorari on this case.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60234

JESUS MORTERA-CRUZ,

Petitioner,

versus

ALBERTO R. GONZALES,
U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed May 9, 2005)

Before GARWOOD, JONES and STEWART, Circuit Judges.

GARWOOD, Circuit Judge:

Appellant Jesus Mortera-Cruz (Mortera) appeals the decision of the Board of Immigration Appeals (BIA) dismissing his petition for adjustment of status under 8 U.S.C. § 1255(i)(1)(A)(i) on the ground that he is inadmissible to the United States under 8 U.S.C. § 1182(a)(9)(C)(i)(I). We affirm.

Facts and Proceedings Below

Mortera is a native and citizen of Mexico. He entered the United States illegally for the first time in November of 1996. On March 28, 2001, he married Margarita Mortera, who was then a lawful permanent resident and has since become a naturalized citizen. Shortly after their marriage, Mrs. Mortera filed a petition with the Immigration and Naturalization Service (INS) for an immigrant visa for her husband. This petition was received by the INS on April 28, 2001.

At some undetermined point after November 1996, Mortera left the United States and illegally reentered on June 10, 2001. Nearly a year later, on April 16, 2002, Mortera was convicted, on his guilty plea, by the United States District Court for the Northern District of Texas, of violating 8 U.S.C. § 1325(a) by illegally entering the United States without inspection on June 10, 2001. On May 10, 2002, the Immigration and Customs Enforcement (ICE)[1] agency of the Department of Homeland Security (DHS) served Mortera with a Notice to Appear (NTA), alleging that he was subject to removal under 8 U.S.C. § 1182(a)(6)(A)(i) as an alien present in the United States without having been admitted or paroled.[2]

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[1] On March 1, 2003, the INS ceased to exist. Its duties were assigned to two agencies within the newly created Department of Homeland Security (DHS): Immigration and Customs Enforcement (ICE) and Citizenship and Immigration Services. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 471(a), 116 Stat. 2135, 2205 (Nov. 25, 2002).

[2] Section 1182(a)(6)(A)(i) provides:

"§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

(Continued on following page)

In response to the NTA, Mortera appeared before an immigration judge (IJ) on September 25, 2002. Mortera maintained that the NTA was in error insofar as it alleged that he illegally entered the United States on June 10, 2001. Through counsel, he contended that his first and only illegal entry occurred in late 1996 and his plea to the contrary before the district court was inadvertent. With the consent of the DHS, the IJ amended the NTA by interlineation to reflect Mortera's representation that the operative date should be in 1996, not 2001. The IJ then found Mortera subject to removal in light of his admission that he had in fact entered illegally in 1996. Mortera then requested permission to adjust his status under 8 U.S.C. § 1255(i)(1)(A)(i) to that of a lawful permanent resident on the basis of his wife's pending visa application for him. The IJ granted Mortera a recess to pursue that option.

Mortera next appeared before the IJ on August 29, 2003, this time with a valid spousal visa, which ICE had approved on March 27, 2003. The DHS contended that Mortera was not eligible to adjust his status under

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Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

. . .

(6) Illegal entrants and immigration violators

(A) Aliens present without admission or parole

(i) In General

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."

section 1255(i)(1)(A)(i) because he was inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I). Section 1182(a)(9)(C)(i)(I) states that aliens are inadmissible if they have more than one year of unlawful presence in the United States and thereafter illegally enter or reenter the United States without being admitted.[3] Mortera, the DHS argued, fell

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[3] Section 1182(a)(9)(C) provides:

"§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission Except as otherwise provided in this chapter [8 U.S.C. §§ 1101-1537], aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

. . .

(C) Aliens unlawfully present after previous immigration violations

(i) In general

Any alien who –

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 1225(b)(1) of this title, section 1229a of this title, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission."

under section 1182(a)(9)(C)(i)(I) because he entered illegally in November of 1996, and then reentered illegally on June 10, 2001, after he had accumulated more than one year of illegal presence. The DHS took the position before the IJ that an alien subject to section 1182(a)(9)(C)(i)(I) was ineligible to adjust his status under section 1255(i)(1)(A)(i) to that of a lawful permanent resident.

Mortera responded once again stating that his 2002 conviction did not accurately reflect his conduct because he only once entered the United States illegally and that entry occurred in 1996, so he was not subject to section 1182(a)(9)(C)(i)(I) because he did not enter the United States without being admitted after he had been unlawfully present in the United States for more than one year. The IJ, now faced with an objection from the DHS, was no longer willing to credit Mortera's account of the facts, and ruled that Mortera was collaterally estopped from denying the truth of the material allegations underlying his conviction. The IJ then ruled in favor of the DHS, concluding that Mortera was inadmissible under section 1182(a)(9)(C)(i)(I) and, as a consequence, was ineligible to adjust his status under section 1255(i) to that of a lawful permanent resident. The IJ also denied Mortera the opportunity to remove himself voluntarily, deciding he was untrustworthy because he had fraudulently used someone else's green card to obtain work.

Mortera then appealed to the BIA, which, on March 5, 2004, affirmed the decision of the IJ and dismissed the appeal. In affirming the IJ, the BIA drew two important conclusions of law: (1) 8 U.S.C. § 1255(i)(1)(A)(i), which allows certain physically present aliens "who entered the United States without inspection" to adjust their status to that of a lawful permanent resident, applies only to aliens

whose sole statutory ground of inadmissibility is established merely by their having made a single entry without inspection (e.g., those who are rendered inadmissible only by § 1182(a)(6)(A)(i), see note 2 *supra*); and (2) the "[e]xcept as otherwise provided" clause of 8 U.S.C. § 1182(a) does not waive the inadmissibility created by section 1182(a)(9)(C)(i)(I) (see note 3, *supra*) and thereby permit such an inadmissible alien to adjust his or her status under section 1255(i)(1)(A)(i). It is from this disposition that Mortera now appeals.[4]

Standard of Review

The BIA's conclusions of law are reviewed *de novo*, "although with the usual deference to the [BIA's] interpretation of ambiguous portions of the Act in accordance with

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[4] Before the BIA Mortera also argued that the IJ had erred in finding that Mortera had entered the United States without being admitted in June 2001 or at any time other than his initial entry into the United States in November 1996, and that, because Mortera's only entry into the United States was his entry (without inspection) in November 1996, he did not enter the United States without admission *after* having been unlawfully present therein for more than one year and accordingly he was *not* within the terms of § 1182(a)(9)(C)(i)(I). This contention was rejected by the BIA which found that the IJ correctly determined that Mortera had entered without admission in November 1996, and after remaining unlawfully present in the United States for more than one year, had reentered without admission in June 2001. In his appeal to this court, Mortera does not challenge this determination of the BIA, and we accordingly accept it.

Mortera does not fall within the exception to § 1182(a)(9)(C)(i) provided for in § 1182(a)(9)(C)(ii) respecting an alien who has been outside the United States more than 10 years since his or her last departure and has, prior to attempting to be readmitted from a foreign contiguous territory, received the Attorney General's consent to reapply for admission (see note 3 *supra*). Nor has Mortera ever contended otherwise.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)." *Carbajal-Gonzalez v. INS*, 78 F.3d 194, 197 (5th Cir. 1996). To warrant deference, the BIA's interpretation of ambiguities in the law must be reasonable. *Lopez-Gomez v. Ashcroft*, 263 F.3d 442, 444 (5th Cir. 2001). In applying this standard, we are mindful that the Attorney General's construction of immigration law is entitled to considerable respect. *Gonzalez v. Reno*, 212 F.3d 1338, 1349 n. 12 (11th Cir.) ("The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials (such as the INS) in matters touching upon foreign affairs. Respect for the authority of the executive branch in foreign affairs is a well-established theme in our law.") (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 119 S. Ct. 1439, 1445 (1999) and *United States v. Curtiss-Wright Export Corp.*, 57 S. Ct. 216, 221 (1936)), *reh'g denied*, 215 F.3d 1243, *cert. denied*, 120 S. Ct. 2737 (2000).

Discussion

I.

Mortera wants to adjust his status under 8 U.S.C. § 1255(i)(1)(A)(i) from that of an illegal alien to that of a lawful permanent resident. Section 1255(i), titled "Adjustment of status of certain aliens physically present in United States," provides in relevant part:

> "(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –
>
> (A) who –
>
> (i) entered the United States without inspection; or

> (ii) is within one of the classes enumerated in subsection (c) of this section; and
>
> (B) who is the beneficiary [of a spousal visa issued under 8 U.S.C. § 1153(d)]
>
> may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence."[5]

The Attorney General may then grant the application *if*, *inter alia*, "the alien is eligible to receive an immigrant visa and is *admissible* to the United States for permanent residence[.]" 8 U.S.C. § 1255(i)(2)(A) (emphasis added).

The Government does not dispute that Mortera is physically present in the United States or that he is the beneficiary of a valid spousal visa. The Government

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[5] 8 U.S.C. § 1255(a) provides:

"§ 1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed."

8 U.S.C. § 1255(c) (entitled "Alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without visa") provides that "Subsection (a) of this section shall not be applicable to (1) an alien crewman; . . . [listing seven other sets of aliens within the general categories stated in subsection (c)'s title]."

maintains, however, that the Attorney General cannot lawfully adjust Mortera's status because, as the BIA determined, section 1182(a)(9)(C)(i)(I) renders him inadmissible to the United States.

The BIA concluded, as the Government now argues, that Mortera is indeed inadmissible under section 1182(a)(9)(C)(i)(I). Section 1182(a)(9)(C), titled "Aliens unlawfully present after previous immigration violations," states that any alien who "has been unlawfully present in the United States for an aggregate period of more than 1 year, . . . and who enters or attempts to reenter the United States without being admitted is *inadmissible*." 8 U.S.C. § 1182(a)(9)(C)(i)(I) (emphasis added) (see note 3 above). The Government contends that the BIA, in ruling Mortera inadmissible, was simply applying the law in a manner consistent with its plain language because Mortera had accumulated more than one year of unlawful presence and he thereafter committed an illegal reentry on June 10, 2001.

Mortera does *not* contend that section 1182(a)(C)(i)(I) does not apply to him – he in effect concedes that it does – but rather argues that the "except as otherwise provided" prefatory language in 8 U.S.C. § 1182(a) (see note 3 above) implicitly *waives* this ground of inadmissibility for purposes of rendering him eligible for an adjustment of status under section 1255(i)(1)(A)(i). Section 1182(a) states at the outset that "[e]*xcept as otherwise provided in this chapter,* aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States." (emphasis added). This "except as otherwise provided" language, Mortera contends, was inserted by Congress to instruct courts that conflicts between section 1182(a) and any other provision

of the Immigration and Nationality Act (INA), 8 § 1101-1537, should be resolved in favor of the other provision. *See, e.g.*, BLACK'S LAW DICTIONARY 1344 (7th ed. 1999) (defining a savings clause as a "statutory provision exempting from coverage something that would otherwise be included."). Mortera contends that just such a conflict exists in this case because section 1255(i)(1)(A)(i) provides for the adjustment of status by a physically present illegal alien like himself who "entered the United States without inspection" whereas section 1182(a)(9)(C)(i) defines him as inadmissible and therefore disqualifies him from adjusting his status. He argues that in this context the savings clause acts as a waiver of his inadmissibility under section 1182(a)(9)(C)(i), thereby giving effect to the otherwise conflicting provision of section 1255(i)(1)(A)(i).

II

The general thrust of Mortera's argument has some force, *as applied to* the ground of inadmissibility specified in 8 U.S.C. § 1182(a)(6)(A)(i) (entry without inspection; see note 2, *supra*), as the Government has recognized. If being inadmissible by virtue of section 1182(a)(6)(A)(i) – entry without inspection – of itself precluded an alien from applying for adjustment of status under section 1255(i)(1)(A)(i) – allowing such application by aliens who "entered the United States without inspection" – then section 1255(i)(1)(A)(i) would be a wholly inoperative nullity. In an effort to avoid treating section 1255(i)(1)(A)(i) as a nullity, the INS implemented a policy under which an alien's inadmissibility under section 1182(a)(6)(A)(i) would not of itself render the alien ineligible to apply for adjustment of status under section 1255(i)(1)(A)(i). The Ninth Circuit recently summarized the history and rationale of this policy:

"The INS itself has recognized the contradiction created by the statutory terms in [8 U.S.C. §§ 1182(a)(6)(A) and 1255(i)]. In a legal opinion issued by the INS's Office of General Counsel on February 19, 1997, the agency found that [section 1182(a)(6)(A)] did not create a statutory bar to adjustment of status, stating that,

> Based on our review of the relevant legislative history of section [1255(i)], it is our opinion that Congress's goals in enacting section [1255(i)] of the Act would not be achieved were the Service to deem entrants without inspection inadmissible when they otherwise qualify for adjustment of status under section [1255(i)] of the Act.

Gen. Couns. Mem. (Feb. 19, 1997), "Request for Legal Opinion: The Impact of the 1996 Act on Section 245(i) of the Act," *quoted in* 74 No. 11 Interpreter Releases 499, 501, *INS General Counsel Issues Important Opinion on EWI Eligibility for Adjustment,* March 24, 1997. The legal opinion reached this result by focusing on the "savings clause" to [section 1182(a)], which precedes the list of classes of inadmissible aliens by stating that the following classes are inadmissible "[e]*xcept as otherwise provided in this chapter*." [section 1182(a)] (emphasis added). This INS legal opinion suggests that [section 1182(a)(6)(A)] does not bar illegal entrants from receiving adjustment of status as a matter of law.

The INS confirmed the applicability of this interpretation in a guidance memorandum issued to all field directors and officers by the INS Associate Commissioner. *See* Memorandum by Louis D. Crocetti, Jr., INS Assoc. Comm'r (May 1,

> 1997), *reprinted in* 2 Bender's Immigration Bulletin 450, 452 (June 1, 1997) ("this new ground of inadmissibility [§ 212(a)(6)(A)] does not disqualify aliens present in the United States without admission or parole from adjustment of status under section 245(i) of the Act"); *see also Immigration Law and Procedure,* Vol. 4, § 51.0[2][b], 51-15 n. 41 [section 1182(a)(6)(A)] ("is trumped by a [section 245(i)] filing where it is permissible").
>
> Thus, [section 1182(a)(6)(A)] is not a ground of inadmissibility that would categorically bar [Petitioner]'s application for adjustment of status."

Perez-Gonzalez v. Ashcroft, 379 F.3d 783, 791 (9th Cir. 2004); *see also* 74 NO. 11 Interpreter Releases 499 (March 24, 1997) & 74 NO. 25 Interpreter Releases 1033 (July 7, 1997) (explaining the legislative purpose and histories of section 1182's various subsections).

The BIA essentially took this position in denying adjustment of status to Mortera, stating that section 1255(i)(1)(A)(i) "was meant to provide a one-time waiver for aliens who entered without inspection [i.e. aliens who are inadmissible under section 1182(a)(6)(A)(i)], not for aliens with multiple illegal entries as described under section 212 [1182](a)(9)(C)(i)(I) of the Act."[6]

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[6] While the BIA refers to "multiple" illegal entries, that was the context of the case before it. As the BIA recognized, § 1182(a)(9)(C)(i) "also requires" that there be an entry or reentry after "an unlawful presence in the United States for more than 1 year." The more than one year unlawful presence requirement does not itself require an illegal entry, as it can arise, for example, by overstaying a visa. Here, however, it arose by presence following the initial illegal entry.

The precise reach of section 1255(i)(1)(A)(i) is an implicit statutory ambiguity the executive branch is authorized to fill. When Congress has left an implicit ambiguity such as this one, the question before us is simply "whether the [decision of the BIA] is based on a permissible construction of the statute." *Chevron,* 104 S. Ct. at 2782. In answering this question, we consider only whether the decision is arbitrary, capricious, or manifestly contrary to the Immigration and Nationality Act. *Id.* We may not substitute our own preference for a reasonable alternative formulated by the BIA. *Id*; *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394, 1401 (1992) ("Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law.") (citations omitted). The specific *Chevron* issue in this case is whether the BIA was acting arbitrarily when it refused to apply section 1255(i)(1)(A)(i) to Mortera's inadmissibility under section 1182(a)(9)(C)(i)(I) in the same way it would have applied section 1255(i)(1)(A)(i) to him if he were inadmissible only by reason of section 1182(a)(6)(A)(i).

To answer this question, it is useful to review the history of these three provisions. Section 1255(i) was enacted in 1994. Pub. L. 103-317, § 506(b), Oct. 1, 1994. Under the version of section 1182 then effective, an alien who was physically present in the United States pursuant to an entry without inspection could adjust his or her status under section 1255(i)(1)(A)(i) to that of a lawful permanent resident because section 1182 did not define

such an alien as being inadmissible.[7] *See* 8 U.S.C. § 1182 prior to April 1, 1997 when Pub. L. 104-208, § 301(c)(1) became effective; 74 NO. 11 Interpreter Releases 499 (March 24, 1997), Appendix II at 3. This changed on April 1, 1997 when the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 took effect and amended 8 U.S.C. § 1182(a)(6)(A)(i) into its present form, which does define aliens who have entered without inspection as inadmissible. Pub. L. 104-208, § 301(c)(1). The INS reasoned that the "except as otherwise provided" clause of section 1182(a) allowed 1255(i)(1)(A)(i) to continue to apply to aliens who had merely entered without inspection because to conclude otherwise would mean that Congress, in amending section 1182(a)(6)(A), intended to render section 1255(i)(1)(A)(i) superfluous and thereby work a major change in federal immigration policy by excluding *all* aliens who had entered without inspection from adjusting their status.

It is doubtful that this was what Congress intended because, tellingly, Congress did not repeal section 1255(i)(1)(A)(i) when it amended section 1182(a)(6)(A) on September 30, 1996 as part of IIRIRA and in fact, as part of an omnibus appropriations bill, revised it on the same day in small ways such as reformulating the surcharge for adjusting status. *See* Pub. L. 104-208, § 376(a)(1), September 30, 1996 (substituting "$1,000" in 8 U.S.C. § 1255(i)(1) for "five times the fee required for the processing of applications under this section."). In addition, the legislative history

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[7] However, § 1255(a), as it presently exists, *and* as it has existed ever since many years prior to 1994, provides for adjustment of status only as to "an alien who was inspected and admitted or paroled into the United States" and who "is admissible to the United States." See note 5, *supra*.

establishes that the rationale for the amendment to section 1182(a)(6)(A) was to eliminate certain procedural advantages some aliens acquired by entering illegally rather than taking the lawful route. 74 NO. 11 Interpreter Releases 499 (March 24, 1997), Appendix II at 5 (citing, *inter alia, Matter of Patel*, 20 I. & N. Dec. 368, 370 (BIA 1991) and *Matter of Estrada-Betancourt*, 12 I. & N. Dec. 191, 194 (BIA 1967)). The purpose of the IIRIRA change to section 1182(a)(6)(A), in other words, was not to preclude all aliens who had entered without inspection from adjusting their status. After careful consideration of IIRIRA's implications, the INS steered a middle course, adopting the position that the "except as otherwise provided" clause of section 1182(a) in effect waived the ground of inadmissibility created by section 1182(a)(6)(A). As a consequence of this waiver, some aliens who had entered without inspection, who had been eligible to adjust their status after 1994 and prior to the IIRIRA amendment, would still be able to adjust their status post-IIRIRA.

Mortera contends that the BIA, which rendered its decision in accordance with this policy, was acting arbitrarily when it refused to treat section 1255(i) as a waiver of his inadmissibility under section 1182(a)(9)(C)(i)(I), which was created by IIRIRA and has no pre-IIRIRA analogue. He in effect argues that there is no salient distinction between sections 1182(a)(6)(A) and (a)(9)(C)(i), and reasons that if, through section 1182(a)'s "except as otherwise provided" clause, section 1255(i)(1)(A)(i) waives the inadmissibility created by section 1182(a)(6)(A)(i), then it should *ipso facto* also waive the admissibility created by section 1182(a)(9)(C)(i).

Mortera finds support for his position in the Ninth Circuit's recent *Perez-Gonzalez* decision. The *Perez-Gonzalez*

court considered, *inter alia*, whether aliens inadmissible under section 1182(a)(9)(C)(i) may avail themselves of section 1255(i)(1)(A)(i) in the same way that aliens inadmissible under section 1182(a)(6)(A) may do so. This was a novel question and, unlike the extensive treatment the INS had given section 1182(a)(6)(A), there is no similar extensive official literature on the interplay between sections 1255(i) and 1182(a)(9)(C)(i). To the extent the INS had addressed this issue, it was in conclusory terms, *see* Memorandum by Louis D. Crocetti, Jr., INS Assoc. Comm'r (May 1, 1997), *reprinted in* 2 Bender's Immigration Bulletin 450, 452 (June 1, 1997), which the panel rejected. *Perez-Gonzalez*, 379 F.3d at 792-93. The court held that an alien inadmissible under section 1182(a)(9)(C)(i)(II) may adjust his or her status under section 1255(i) because "[n]othing in the statutory provisions regarding adjustment of status, nor in the discussion of its purposes, suggests that aliens who have been previously deported or removed are barred from this form of relief." *Id.* at 793.

The Tenth Circuit also recently addressed the same basic question and expressly declined to follow *Perez-Gonzalez*. *Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1166-1168 (10th Cir. 2004); *see also Lattab v. Ashcroft*, 384 F.3d 8, 17 (1st Cir. 2004) (stating, while considering somewhat different facts, "we have grave doubts about the correctness of the *Perez-Gonzalez* court's conclusion."). Contrary to the *Perez-Gonzalez* court, and contrary to the position Mortera takes before us, the Tenth Circuit distinguished the inadmissibility created by different subsections of section 1182(a). The *Berrum-Garcia* court concluded that the distinction between applying section 1255(i) to "one-time" illegal entrants (under section 1182(a)(9)(B)) but not those with multiple illegal entries under section

1182(a)(9)(C)(i) did not abrogate Berrum-Garcia's due process rights because the statutes make it clear that Congress considered the conduct at issue in section 1182(a)(9)(C)(i) more serious than that described in section 1182(a)(9)(B). 390 F.3d at 1167-1168. The court focused in particular on the fact that illegal aliens falling under the more severe section 1182(a)(9)(C)(i), to which Mortera is subject, face a lifetime ban on admissibility,[8] whereas those under section 1182(a)(9)(B) are inadmissible only for certain discrete periods based on the amount of illegal presence they accumulate. This observation led the court to conclude that "Congress did not consider those who reenter the United States in defiance of a prior deportation order to be qualified for section 1255(i)." *Id.* at 1167-68.[9]

We agree with the Tenth Circuit that the conduct proscribed by section 1182(a)(9)(C)(i) is both different from and more culpable than the conduct of a one-time illegal alien subject to inadmissibility under 1182(a)(9)(B)(i) and, by extension, more culpable than the conduct of an alien who is inadmissible only under section 1182(a)(6)(A)(i).[10]

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[8] The alien subject to this lifetime ban may, after ten years, apply to the Attorney General to have the ban lifted. 8 U.S.C. § 1182(a)(9)(C)(ii).

[9] In the instant case, the basis for Mortera's inadmissibility is § 1182(a)(9)(C)(i)(I), which involves an illegal reentry after accumulating more than one year of illegal presence, whereas Berrum-Garcia was inadmissible under § 1182(a)(9)(C)(i)(II). For the purposes of our analysis, this is a distinction without a difference because both provisions are subject to the same default penalty of lifetime inadmissibility. Also, the two provisions ((I) and (II)) have the same single subject ("Any alien who") and are but alternate predicates to the same single operative phrase, "who enters or attempts to reenter the United States without being admitted is inadmissible." See note 3 *supra*.

[10] *Compare* 8 U.S.C. § 1182(a)(6)(A)(i), under which inadmissibility is predicated on entry without parole or admission, and 8 U.S.C.

(Continued on following page)

The extent of the inadmissibility created by different immigration violations demonstrates that Congress intended to treat different violations differently. In our view, the policy developed by the executive branch, as expressed in the BIA's opinion, is a rational approach to reconciling the apparent tension in the statutes and in a reasonable way implements the intent of Congress that some, but not all, illegal aliens may adjust their status to that of a lawful permanent resident. *Unlike* section 1182(a)(6)(A)(i), application of section 1182(a)(9)(C)(i) to preclude eligibility for adjustment of status under section 1255(i)(1)(A)(i) does *not* render section 1255(i)(1)(A)(i) a nullity. Not all aliens covered by section 1255(i)(1)(A)(i) are rendered inadmissible by section 1182(a)(9)(C)(i). We hold, therefore, that the decision of the BIA is entitled to *Chevron* deference because the Board was not acting arbitrarily when it ruled that Mortera, who is inadmissible under section 1182(a)(9)(C)(i)(I), is not eligible to adjust his status under section 1255(i)(1)(A)(i).

Conclusion

For the foregoing reasons, the decision of the BIA is

AFFIRMED.

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§ 1182(a)(9)(B)(i), under which inadmissibility is based on unlawful presence. Under neither provision is a second illegal entry an issue.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A79 047 267 – San Antonio Date: **MAR – 5 2004**

In re: JESUS **MORTERA**-CRUZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marisol L. Perez, Esquire

ON BEHALF OF DHS: Nancy A. Kryzanowski
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled

APPLICATION: Waiver of Inadmissibility, adjustment of status

The respondent appeals the Immigration Judge's August 23, 2003, decision pretermitting his applications for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i) (1999), and for a waiver of inadmissibility. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) filed a brief in support of the Immigration Judge's decision. The appeal will be dismissed.

The DHS alleged that the respondent, a native and citizen of Mexico, entered the United States on June 10, 2001, without inspection. The respondent conceded removability under section 212(a)(6)(A)(i) of the Act, 8 U.S.C.

§ 1182(a)(6)(A)(i), but argued that his last entry date was in November of 1996, not June 10, 2001. The Immigration Judge amended the Notice To Appear (Form I-862) to reflect this change and found him removable as charged.

During the pendency of the proceedings before the Immigration Judge, the DHS approved an I-130 visa petition filed on the respondent's behalf by his United States citizen wife (Exh. 2). The respondent subsequently filed applications for adjustment of status and for a waiver of inadmissibility. The respondent filed a waiver of inadmissibility because of a prior conviction for Improper Entry By Alien for using false documents to enter the Untied States (Exh. 8-F). *See* 8 U.S.C. §§ 1325, 1329.

In order to adjust to lawful permanent resident status under section 245 of the Act, an alien must be admissible to the Untied States for permanent residence. *See* section 245(a)(2), (i)(2) of the Act. The respondent believed that his conviction for using false documents made him an inadmissible alien under section 212(a)(6)(C) of the Act, but this ground of inadmissibility could be waived under section 212(i) of the Act. However, the Immigration Judge found that the respondent was also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, as an alien unlawfully present after previous immigration violations. There are no waivers of inadmissibility for section 212(a)(9)(C) of the Act, nor does the respondent fall within the exception for battered aliens. *See* 212(a)(9)(C)(ii) of the Act. Since the respondent was ineligible for a waiver of inadmissibility, the Immigration Judge found him ineligible for adjustment of status as an inadmissible alien.

On appeal, the respondent contends the Immigration Judge erred by finding him inadmissible under section

212(a)(9)(C)(i)(I) of the Act. Section 212(a)(9)(C)(i)(I) requires an unlawful reentry into the United States after a previous unlawful stay in the United States. The respondent conceded he entered the United States without inspection in 1996, and his conviction documents indicate that he made another illegal entry into the United States on June 10, 2001 (Exh. 8-F). The respondent argues that the conviction documents were inaccurate, as he gave false information to the immigration agent when he was arrested. Further, he contends he only plead to the charge because he made an illegal entry in 1996, not June 10, 2001. However, there is no evidence in the conviction records that the respondent plead guilty to anything other than to the facts as described in the criminal complaint (Exh. 8-F). *See Matter of Edward*, 20 I&N Dec. 191 (BIA 1990). Accordingly, we find no clear error in the Immigration Judge's factual finding that he reentered the United States on June 10, 2001. *See* 8 C.F.R. § 1003.1(d)(3) (2003). Thus, the respondent is inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

The respondent also contends on appeal that inadmissibility under section 212(a)(9)(C)(i)(I) of the Act is waived by adjustment of status under section 245(i) of the Act. We disagree. Adjustment of status under section 245(i) of the Act was meant to provide a one-time waiver for aliens who entered without inspection, not for aliens with multiple illegal entries as described under section 212(a)(9)(C)(i)(I) of the Act. While entry without inspection is an element of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, it also requires a reentry and an unlawful presence in the United States for more than 1 year. The respondent's construction of the "savings clause" of section 212(a) of the Act is too broad for section 245(i) to waive inadmissibility

under section 212(a)(9)(C)(i)(I). Accordingly, the respondent's appeal is dismissed.

ORDER: The appeal is dismissed.

/s/ Frederick Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Antonio, Texas

File No.: A 79 047 267 August 23, 2003

In the Matter of)
)
JESUS MORTERA-CRUZ) IN REMOVAL PROCEEDINGS
)
Respondent)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act: alien present in the United States without admission or parol.

APPLICATIONS: Section 245(i) of the Immigration and Nationality Act: adjustment of status; Section 212(h) of the Immigration and Nationality Act: waiver of inadmissibility; Section 240B of the Immigration and Nationality Act: voluntary departure.

ON BEHALF OF RESPONDENT:

Marisal Perez, Esq.

Joseph DeMott and Associates
8930 Winds Drive
Suite 106
San Antonio, Texas 78239

ON BEHALF OF DHS:

Nancy Kryzanowski, Esq.

Department of Homeland Security
P.O. Box 1939
San Antonio, Texas 78297

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native, and citizen of Mexico who is present in the United States without admission or parole. On May 6, 2002, the Immigration and

Naturalization Service (now the Department of Homeland Security) issued a Notice to Appear charging the respondent with inadmissibility as shown above. The Government originally alleged that the respondent arrived in the United States without admission or parole on or about June 10, 2001. That date was amended before the Court to November of 1996. The respondent admitted the allegations in the Notice to Appear and conceded inadmissibility as charged. Based upon those admissions and the concession of the respondent on the issue of inadmissibility, I conclude that removability has been established by evidence that is clear and convincing.

The respondent requested an opportunity to seek relief from removal based upon an approved immediate relative petition filed on his behalf. *See* Exhibit No. 2.

At a hearing before the undersigned, the respondent presented evidence with regard to his applications for relief. Specifically, the respondent has filed with the Court a Form I-485, a supplement "A" to the Form I-485, as well as a Form I-601. The respondent also filed supporting documentation.

Before considering the testimony of the respondent, the Government moved to pretermit the applications for statutory ineligibility. The Government contends that the respondent is inadmissible under Section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act and also that the respondent does not come within the exception contained in 212(a)(9)(C)(ii) of the Immigration and Nationality Act. Further, the statute does not provide a waiver for inadmissibility under Section 212(a)(9)(C)(i) of the Immigration and Nationality Act. In that regard, the respondent claims that he last entered the United States without

inspection in November of 1996. The respondent has presented to the Court, however, a copy of a criminal complaint and judgement which reflect that he was convicted of the offense of illegal entry; and the complaint recites that the entry occurred on or about June 10, 2001. *See* Group Exhibit No. 6, pages 69 through 71. The judgement reflects that the respondent plead guilty to the information in the criminal complaint and that he was, in fact, found guilty of that offense.

The respondent has denied that he did, in fact, enter illegally on or about June 10, 2001, and has offered to present testimony in that regard. I find, however, that the respondent would be collaterally estopped from disputing the illegal entry in 2001 inasmuch as he was convicted of that offense following his plea of guilty before the United States District Court. That is, I find that the Court necessarily had to address the issue of whether or not the respondent entered the United States illegally on the date in the complaint and the respondent had an opportunity to litigate that very issue. I further note that the criminal conviction appears valid on its face.

Accordingly, based on the evidence presented, I find that the respondent has been unlawfully present in the United States for more than one year and that he did, in fact, enter or attempt to enter the United States without admission. I, therefore, find that he does come within the express terms of Section 212(a)(9)(C) of the Immigration and Nationality Act and that he is inadmissible under that Section of law. I find the respondent does not qualify for any exception nor does the statute provide a waiver. Accordingly, I find that the respondent is statutorily ineligible for adjustment of status as he is unable to show that he is not inadmissible and he is further unable to

show that he is qualified for any kind of waiver that would waive the ground of inadmissibility discussed above.

The respondent has also requested an opportunity to seek relief in the form of voluntary departure. To be eligible for that relief, the respondent must, among other things, show that he is a person of good moral character and that he has been at least the last five years. The issue is whether or not the respondent's admitted use of a fraudulent I-551 or lawful, permanent resident card in 1999 is a crime involving moral turpitude such that he would be precluded from establishing good moral character under Section 101(f)(3) of the Immigration and Nationality Act. The respondent does not deny having violated 18 U.S. Code Section 1546(b), and that statute provides for a maximum penalty of up to five years in prison. The statute also requires the use of a fraudulent document or a fraudulent attestation when the actor knows or has reason to know that the document is, in fact, false. I find that that statute does require an intention to deceive and, as such, I find that it would involve moral turpitude; and it is properly classified as a crime involving moral turpitude. Accordingly, I find that the respondent is statutorily ineligible to establish his good moral character for at least the last five years and that he is, therefore, unable to establish his eligibility for voluntary departure. *See* 8 C.F.R. Section 240.26(c)(1)(ii). The respondent has not applied for any other form of relief from removal, nor does he appear to be eligible for any such relief.

Accordingly, the following orders are hereby entered.

ORDER

IT IS ORDERED that the respondent's application for adjustment of status be pretermitted and denied for statutory ineligibility.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.

/s/ Glenn P. McPhaul
GLENN P. MCPHAUL
United States Immigration Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60234

JESUS MORTERA-CRUZ

Petitioner

v. (Filed Jun. 7, 2005)

ALBERTO R GONZALES,
U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Opinion 5/9/05, 5 Cir., ___, ___ F.3d ___)

Before Garwood, Jones, and Stewart, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Garwood
United States Circuit Judge

STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. § 1255(i), which provides:

(i) Adjustment of status of certain aliens physically present in United States (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –

(A) who –

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of –

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equalling $1,000 as of the date of receipt of the

application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986 at any date, who –

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if –

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

(3)(A) The portion of each application fee (not to exceed $200) that the Attorney General determines is required to process an application under this section and is remitted

to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (o) of section 1356 of this title.

(B) Any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention Fund established under section 1356(r) of this title, except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section 1356(m) of this title.

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2. 8 U.S.C. § 1182(a)

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

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3. 8 U.S.C. § 1182(a)(6)(A)(i)

(6) Illegal entrants and immigration violators

(A) Aliens present without admission or parole

(i) In general

> An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

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4. 8 U.S.C. § 1182(a)(9)(C)

(C) Aliens unlawfully present after previous immigration violations

(i) In general

Any alien who –

> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
>
> (II) has been ordered removed under section 1225(b)(1) of this title, section 1229a of this title, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission. The Attorney General in the Attorney General's discretion may waive the provisions of subsection (a)(9)(C)(i) in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv), or (v) of

section 1154(a)(1)(A) of this title, or classification under clause (ii), (iii), or (iv) of section 1154(a)(1)(B) of this title, in any case in which there is a connection between –

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's –

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

Supreme Court, U.S.
FILED
OCT 28 2005
OFFICE OF THE CLERK

No. 05-148

In the Supreme Court of the United States

JESUS MORTERA-CRUZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
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Attorneys

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QUESTION PRESENTED

Whether an alien who is inadmissible by virtue of having illegally reentered the United States and maintaining unlawful presence for more than one year, 8 U.S.C. 1182(a)(9)(C)(i)(I), is eligible to apply for adjustment of status pursuant to 8 U.S.C. 1255(i).

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In the Supreme Court of the United States

No. 05-148

JESUS MORTERA-CRUZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 409 F.3d 246. The decision of the Board of Immigration Appeals (Pet. App. 19-22) and the decision of the immigration judge (Pet. App. 23-27) are unreported.

JURISDICTION

The court of appeals entered its judgment on May 9, 2005. A petition for rehearing was denied on June 7, 2005 (Pet. App. 28). The petition for a writ of certiorari was filed on July 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien "who was inspected and admitted or paroled into the United States" may apply for adjustment

of status to that of lawful permanent residence if, *inter alia*, the alien is "admissible" to the United States. 8 U.S.C. 1255(a). Before 1994, an alien who entered the United States without inspection was not eligible to apply for adjustment of status. In 1994, Congress enacted a provision permitting aliens who entered without inspection to apply for adjustment of status in certain circumstances. 8 U.S.C. 1255(i)(1)(A)(i); see Act of Aug. 26, 1994, Pub. L. No. 103-317, § 506(b), 108 Stat. 1765. To be eligible for adjustment of status under that provision, an alien who entered without inspection must, *inter alia*: (i) be the beneficiary of an immediate relative visa petition filed on or before April 30, 2001, or of an application for labor certification that was filed on or before that date, 8 U.S.C. 1255(i)(1)(B); and (ii) be "admissible" to the United States for permanent residence, 8 U.S.C. 1255(i)(2)(B).

A separate provision of the Immigration and Nationality Act (INA) sets forth certain categories of aliens who, "[e]xcept as otherwise provided in" the INA, are "ineligible to be admitted to the United States." 8 U.S.C. 1182(a). The categories of aliens deemed ineligible for admission under that provision include: (i) aliens who are present "in the United States without being admitted or paroled," 8 U.S.C. 1182(a)(6)(A)(i); and (ii) aliens who "enter[] or attempt[] to reenter the United States without being admitted" and have either been "unlawfully present in the United States for an aggregate period of more than 1 year" or have previously been "ordered removed." 8 U.S.C. 1182(a)(9)(C)(i). Section 1182(a)(6)(A)(i) deems an alien who is present in the country without having been admitted to be inadmissible, but the provision does not otherwise bar the alien from applying for admission (*i.e.*, from abroad). Section

1182(a)(9)(C)(i), in contrast, gives rise to a lifetime bar against admission for aliens who *re*enter the country without inspection and who have accrued more than one year of unlawful presence or have previously been ordered removed. That bar is subject to a discretionary waiver by the Attorney General permitting an alien to reapply for admission from abroad after at least ten years have elapsed since the alien's latest departure from the United States. See 8 U.S.C. 1182(a)(9)(C)(ii).

2. Petitioner is a native and citizen of Mexico who entered the United States without inspection for the first time in 1996. On March 28, 2001, petitioner married a lawful permanent resident, and on April 28, 2001, petitioner's wife filed an immediate relative immigrant visa petition on his behalf. Petitioner's wife subsequently became a naturalized citizen. Pet. App. 2.

At some point after having accumulated more than a year of unlawful presence in the United States, petitioner left the country. Petitioner returned to the United States on June 10, 2001, and he again unlawfully entered without inspection. On April 16, 2002, petitioner pleaded guilty to having illegally entered the United States without inspection in June 2001, in violation of 8 U.S.C. 1325(a). On May 10, 2002, petitioner was charged with being subject to removal as an alien unlawfully present in the United States without having been admitted or paroled. Pet. App. 2.

3. a. On September 25, 2002, petitioner appeared before an immigration judge (IJ). Petitioner conceded that he was removable because he had entered the country illegally in 1996, but he requested permission to adjust his status to that of lawful permanent resident under 8 U.S.C. 1255(i)(1)(A)(i) based on the relative visa petition filed on his behalf by his wife. The government

argued that petitioner was not eligible for adjustment of status by virtue of 8 U.S.C. 1182(a)(9)(C)(i)(I). The government pointed out that an alien must be "admissible" to be eligible for adjustment of status under 8 U.S.C. 1255(i), and contended that petitioner was "inadmissible" pursuant to 8 U.S.C. 1182(a)(9)(C)(i)(I) because he had been unlawfully present in the United States for more than one year and had then reentered the country without being admitted.[1] Petitioner argued in response that, although he had illegally entered the United States in 1996, he had not left the country since that time, and that he therefore had not unlawfully reentered the country in June 2001. While the proceedings were pending before the IJ, the Department of Homeland Security (DHS) approved the visa petition filed on petitioner's behalf by his wife. Pet. App. 3-4.

The IJ ruled that petitioner's guilty plea collaterally estopped him from disputing that he had unlawfully reentered the United States in June 2001. The IJ held that petitioner was inadmissible pursuant to Section 1182(a)(9)(C)(i)(I) because he had illegally reentered the country and had been unlawfully present for more than one year, and that petitioner therefore was ineligible to apply for adjustment of status. Pet. App. 25-26.

b. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 19-22. The BIA initially found no clear error in the IJ's finding that petitioner had illegally reentered the United States in June 2001. *Id.* at 21. The BIA then addressed petitioner's

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[1] Section 1182(a)(9)(C)(i) states that "[a]ny alien who—(I) has been unlawfully present in the United States for an aggregate period of more than 1 year * * * and who enters or attempts to reenter the United States without being admitted is inadmissible." 8 U.S.C. 1182(a)(9)(C)(i).

argument that he retains eligibility to apply for adjustment of status pursuant to Section 1255(i) notwithstanding that he is inadmissible under Section 1182(a)(9)(C)(i)(I).

In rejecting that argument, the BIA drew a distinction between an alien who enters the United States without inspection and seeks adjustment of status before leaving the country, and an alien who illegally *re*enters the country without inspection and seeks adjustment of status. According to the BIA, "[a]djustment of status under [Section 1255(i)] was meant to provide a one-time waiver for aliens who entered without inspection, not for aliens with multiple illegal entries as described under section [1182(a)(9)(C)(i)(I)]." Pet. App. 21. The BIA explained that, "[w]hile entry without inspection is an element of inadmissibility under section [1182(a)(9)(C)(i)(I)]," that provision "also requires a reentry and an unlawful presence in the United States for more than 1 year." *Ibid.* The BIA held that an alien covered by that provision is inadmissible and ineligible for adjustment of status. *Id.* at 21-22.

4. The court of appeals affirmed. Pet. App. 1-18. The court held that the BIA's decision was entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the decision addressed a statutory ambiguity concerning the relationship between Section 1255(i) and Section 1182(a)(9)(C)(i)(I). Pet. App. 13. The court ruled that the BIA permissibly concluded that an alien who is inadmissible under Section 1182(a)(9)(C)(i)(I) is ineligible to apply for adjustment of status under Section 1255(i). In particular, the court concluded that the BIA had not acted arbitrarily in distinguishing between aliens deemed inadmissible based on their having en-

tered the country without inspection, 8 U.S.C. 1182(a)(6)(A)(i), and aliens deemed inadmissible based on their having *re*entered the country without inspection and having accrued a period of unlawful presence exceeding one year, 8 U.S.C. 1182(a)(9)(C)(i)(I). Pet. App. 18.

The court observed that, when Congress initially enacted Section 1255(i) in 1994 and thereby permitted certain aliens who entered the country without inspection to apply for adjustment of status, the INA did not then provide that an alien who entered the country without inspection was inadmissible. The court explained that, when Congress later amended Section 1182(a)(6)(A)(i) in 1996 to provide that an alien who enters without inspection is deemed inadmissible, Congress did not intend to nullify Section 1255(i) by rendering aliens who entered without inspection ineligible to apply for adjustment of status. The court found it telling that Congress did not repeal Section 1255(i) when it amended Section 1182(a)(6)(A)(i), nor did it otherwise indicate an intention to render Section 1255(i) ineffectual. Accordingly, the court explained, the government had adopted the position that an alien deemed inadmissible under Section 1182(a)(6)(A)(i) retains eligibility to seek adjustment of status under Section 1255(i). Pet. App. 13-15.[2]

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[2] As the court explained, the government's position was grounded in the understanding that the various grounds of inadmissibility set forth in Section 1182(a) are subject to an overarching exception for circumstances in which Congress "otherwise provided" elsewhere in the INA, and that Congress had "otherwise provided" in Section 1255(i) that an alien who has entered without inspection may seek adjustment of status. See Pet. App. 11-12.

The court rejected petitioner's contention that the BIA was required to treat an alien inadmissible under Section 1182(a)(9)(C)(i)(I) in the same manner as an alien inadmissible under Section 1182(a)(6)(A)(i), such that both categories of aliens would retain eligibility to seek adjustment of status under Section 1255(i). The court agreed with the reasoning of the Tenth Circuit in *Berrum-Garcia* v. *Comfort*, 390 F.3d 1158 (2004), which had distinguished between "one-time" illegal entrants subject to inadmissibility under Section 1182(a)(6)(A)(i) and aliens "with multiple illegal entries under section 1182(a)(9)(C)(i)." Pet. App. 16-17. The court of appeals explained that the conduct encompassed by Section 1182(a)(9)(C)(i) is "different from and more culpable than the conduct of a one-time illegal alien" who is inadmissible under Section 1182(a)(6)(A)(i). Pet. App. 18. The court further observed that, unlike Section 1182(a)(6)(A)(i), "application of section 1182(a)(9)(C)(i) to preclude eligibility for adjustment of status * * * does *not* render section 1255(i)(1)(A)(i) a nullity." *Ibid.* The court therefore held "that the decision of the BIA is entitled to *Chevron* deference because the [BIA] was not acting arbitrarily" by ruling that petitioner's inadmissibility under Section 1182(a)(9)(C)(i)(I) rendered him ineligible to seek adjustment of status under Section 1255(i). *Ibid.*

ARGUMENT

Petitioner seeks this Court's review of the question whether an alien who is inadmissible under Section 1182(a)(9)(C)(i)(I), based on his having illegally reentered the country and having maintained a period of unlawful presence of more than one year, retains eligibility to apply for adjustment of status under Section